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317-347—68——1

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 317

AMERICO DI PIETTO, ERNEST INFELICE, JAMES MIRRO, FRANK SANTUCCI, AND ROBERT J. MCDONNELL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1968. A petition for rehearing was denied on June 20, 1968. The petition for a writ of certiorari was filed on July 19, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the insertion of the amount, payee, date and name of the sender on American Express money orders constitutes the false making, forgery, or alteration of a security within the meaning of 18 U.S.C. 2314.

2. Whether the trial judge committed reversible error in his treatment of a note from the jury.

3. Whether there was prejudicial error in evidence elicited and comments by the prosecutor which the trial judge instructed the jury to disregard.

STATEMENT

Petitioners were convicted by a jury in the United States District Court for the Northern District of Illinois of conspiracy to transport falsely made, forged, altered or counterfeit securities in interstate commerce, in violation of 18 U.S.C. 2314. Petitioners other than McDonnell were sentenced to five years' imprisonment; McDonnell was sentenced to two years' imprisonment. The court of appeals affirmed (Pet. App. A).

The sufficiency of the evidence is not in issue. It showed that, in May 1961, petitioner Santucci stole 148 American Express money orders from a store where they were held for sale to customers. The money orders, which were payable in New York, bore an imprinted signature on behalf of American Express Company and were stamped with the words "not payable for more than one hundred dollars." The spaces for amount, payee, date, and sender's name and ad-

dress were blank at the time the orders were stolen (Pet. App. 2).

Petitioners DiPietto and Infelice, with the knowledge and consent of Santucci and petitioner Mirro, arranged with one Ackerman, an unindicted co-conspirator and the principal government witness, to pass the money orders (D. App. 39, 42–44, 53, 180–181).[1] In June 1961, Ackerman sought the aid of petitioner McDonnell, who in turn later enlisted one O'Connor to handle the money orders (D. App. 47–48). Ackerman delivered the money orders to O'Connor in St. Louis, and O'Connor took them to Kansas City, Missouri, where he, another unindicted co-conspirator named Lent, and Lent's wife filled in about eighty of the orders. Mrs. Lent wrote in the sender's name as W. R. Stanley of Chicago and the payee as Henry L. Stanley. Lent typed in the amount of $100 on each order, and O'Connor used a copying machine and Lent's documents to make out false identity papers in the name of Henry L. Stanley (D. App. 53–54, 161–162).[2]

Lent then went to Springfield, Missouri, where he cashed several of the orders before being arrested. He telephoned O'Connor from the police station, and told him what had happened. O'Connor fled to Michigan City, Indiana, and Chicago, and was for a time in contact with some of the petitioners. The remaining

[1] "D. App." refers to the joint appendix of the defendants containing excerpts from the testimony at trial. A copy of this appendix is on file with the Clerk of this Court.

[2] A replica of one of the money orders as filled out and cashed appears at Pet. App. D.

money orders were subsequently returned to petitioner Di Pietto (D. App. 56–61, 70–73, 163–165).

ARGUMENT

1. Petitioners contend that the stolen money orders—on which co-conspirator Lent and his wife had inserted the amount, date, name and address of sender, and payee—were not the type of forged security contemplated by 18 U.S.C. 2314. Petitioners' theory (Pet. 10) is that only a "falsely made" security is reached by the statute, and that since the name of the American Express Company as primary obligor on the money orders had already been attached at the time they were stolen, the fraudulent completion of the instruments did not constitute a false "making". That theory unduly restricts the intended operation of the statute.

The conduct proscribed by the statute includes not only the interstate transportation of a "falsely made" security, but also the transportation of "forged" and "altered" securities—categories which apply to genuinely issued instruments as well as those which have been counterfeited. See *Hall* v. *United States,* 372 F. 2d 603, 608–610 (C.A. 8). At common law, the term forgery embraced the alteration of any material portion of a writing "to the prejudice of another man's right." See *Gilbert* v. *United States,* 370 U.S. 650, 657. That definition is broad enough to encompass the fraudulent completion of the American Express money orders involved here. Since there is no indication that Congress intended to adopt a nar-

rower defintion of the term "forged" in 18 U.S.C. 2314 (see S. Rep. No. 674, 76th Cong., 1st Sess.), the term must be deemed to have been used in its ordinary, common-law sense. See *Gilbert* v. *United States, supra,* 370 U.S. at 655.

In *Streett* v. *United States,* 331 F. 2d 151 (C.A. 8), relied on by petitioners, the court held that the false countersignature of the purchaser's name on previously issued travelers checks did not render the checks "falsely made or forged" securities within 18 U.S.C. 2314. The court relied on this Court's holding in *Prussian* v. *United States,* 282 U.S. 675, that the false endorsement of the payee's name on a fully completed and validly issued government draft did not constitute forgery of the draft under 18 U.S.C. 471 (then 18 U.S.C. 262). The statute involved in *Prussian,* however, applied only to government obligations or securities, and the Court found that its purpose was "the protection of the bonds or currency of the United States, and not the punishment of any fraud or wrong on individuals" (282 U.S. at 678). Section 2314, on the other hand, is designed to aid the States in the enforcement of their laws against the forging or counterfeiting of private commercial securities by prohibiting the interstate transportation of such securities. See *United States* v. *Sheridan,* 329 U.S. 379. Moreover, the Court also held in *Prussian* that the false endorsement of a government draft could be prosecuted under a separate statute (now 18 U.S.C. 495). 282 U.S. at 679–680. No comparable statute is available with respect to nongovernmental securities. See *Streett* v. *United States, supra,* 331 F. 2d at 154.

While the soundness of the court's decision in *Streett* is not free from doubt,[3] that case is distinguishable on its facts, as the court below correctly held, from the present case (Pet. App. 5). In *Streett*, as in *Prussian*, all that was done was to countersign or endorse instruments which had been regularly issued for a specified amount. In this case, the money orders did not purport to evidence an obligation of American Express to pay a specified amount to any person until they were falsely completed, in their entirety, by petitioners' co-conspirators, to the prejudice of the primary obligor.

2. Petitioners contend that the trial court committed reversible error in its treatment of a note from the jury indicating that they had reached an impasse. The facts are set forth in detail in the opinion of the court below (Pet. App. 5–7). Upon being informed of the note, the judge, who was attending a judicial conference, sent a message to the jury instructing them "to continue their deliberations." In view of the court's previous instructions that the jury was not required to reach a decision (Pet. App. 6), the direction to continue their deliberations was not coercive. While the better practice would have been to reply to the jury's note in the presence of petitioners and their counsel, the court below properly found that any error was harmless. *United States* v. *Grosso*, 358 F. 2d 154 (C.A. 3), reversed on other grounds, 390 U.S. 62.

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[3] See La Buy, *Manual on Jury Instructions*, 36 F.R.D. 457, 675–678.

3. Petitioners have combed the record to place in juxtaposition instances in which the court instructed the jury to disregard certain evidence or comments so as to suggest that there were "repeated prejudicial comments and actions by the prosecutor" which cumulatively could not be erased from the jury's mind. In context, however, the separate matters which the judge instructed the jury to disregard were minor events in a hotly contested trial, and, as the court below correctly held, there was no cause for a mistrial.[4]

a. The indictment charged that the conspiracy continued after the arrest of Lent and that the defendants committed acts of concealment in furtherance of the conspiracy (see D. App. 22–24). Ackerman testified that in late June 1961, after Lent had been arrested and O'Connor had fled, he was summoned to a meeting with petitioners Mirro, Di Pietto, and Infelice, at which Lent and O'Connor were discussed (D. App. 59–60). Mirro pointed out that O'Connor "is the only guy that can put us in the penitentiary" (D. App. 60). He stated (D. App. 61), "There is only one way to handle it. * * * It has been my experience over a long time that you have got to bury some-

[4] Contrary to petitioners' contention, this case does not present any question of the applicability of *Bruton* v. *United States*, 391 U.S. 123. *Bruton* held that the inherent prejudice flowing from a co-defendant's confession implicating the defendant could not be cured by a limiting instruction that the confession should not be considered against the defendant who did not make it. There is no comparable inherent prejudice arising from the routine instances involved here of the elicitation of inadmissible evidence or the making of an improper remark (391 U.S. at 135).

body who can bury you and put you in the penitentiary." The prosecutor referred to this testimony several times in closing argument (D. App. 282–283).

Ackerman testified that on another occasion, while riding with Mirro in a car, Mirro pointed out a farm on the side of the road and said (D. App. 69), "That's Jack McGurn's private cemetery. That's where he used to bury all the guys he hit. That's where O'Connor ought to get buried." An objection was sustained. At the conclusion of Ackerman's direct examination, defense counsel moved for a mistrial and to strike all of Ackerman's testimony post-dating the arrest of Lent. The court denied the motion but instructed the jury to disregard the reference by Mirro to McGurn's "cemetery" (D. App. 74–75, 282). That testimony was not alluded to thereafter by the prosecutor.

Ackerman's testimony that Mirro wanted to "bury" O'Connor was proper evidence against petitioners. Their part in the conspiracy had not been terminated by the arrest of Lent and the flight of O'Connor. They were acting together to determine how to revise their plans in view of the arrest. Indeed, after the above incidents, O'Connor, at Ackerman's direction, returned to Michigan City, Indiana, to retrieve the remaining money orders. O'Connor gave them to Ackerman, who gave them to Di Pietto. When Di Pietto received the money orders, he stated (D. App. 72–73): "I think we can use what's left." The single reference to McGurn's cemetery added little to the evidence properly admitted. There is nothing to indicate that the prosecutor deliberately elicited that testimony, to which no

further reference was made. And there is no reason to believe that the jury could not follow the trial court's instruction to disregard it.

b. F.B.I. agent Stephan testified for the government regarding two interviews he had had with petitioner McDonnell, at which McDonnell denied all participation in the crime. On cross-examination, McDonnell, an attorney who conducted his own defense, asked (D. App. 219), "Isn't it a fact, Mr. Stephan, that I asked you to submit me to a lie test concerning these * * * ?" The prosecutor's objection was overruled, and the witness thereafter testified that McDonnell had asked to be given a lie detector test but that his request was refused. On redirect examination, the prosecutor asked (D. App. 222), "And Mr. McDonnell wasn't given a lie test because they don't mean anything, isn't that right?" The trial judge sustained an objection to the question, stating "Lie detector tests are not admissible in evidence in this jurisdiction, and the jury will disregard the question."[5] Since petitioner McDonnell had opened up the inquiry, the prosecutor's question cannot be considered a deliberate attempt at impropriety. The court's instruction to disregard the question, coupled with the explanation, removed any prejudice.

c. Kalady, who had been in protective custody with Ackerman at the Cook County witness quarters, was called by petitioner Mirro and testified that, at Ackerman's suggestion, he had invented a false story

[5] The entire colloquy following the prosecutor's question is set forth at Pet. 19.

about being a witness to a murder in order to influence the authorities to drop some of the charges against him (D. App. 244–246). On cross-examination, petitioner McDonnell asked (D. App. 252), "Mr. Kalady, as a matter of fact, you fully expect and have been told that you will be a government witness in other cases, haven't you?" The prosecutor stated, "I object. Not any more." The trial judge sustained the objection. Defense counsel then moved for a mistrial on the basis of the prosecutor's remark, which the court apparently had not heard. The court denied the motion and instructed the jury to "disregard [the prosecutor's] comment. It has no bearing on this case and you will disregard it completely." The prosecutor apologized in open court for the remark. See Pet. 19–20.

While the comment was "unnecessary and irrelevant" (Pet. App. 10), it was not prejudicial. Petitioner McDonnell's question itself was obviously improper, as the trial court ruled, since it implied that the government was prepared to use Kalady, a self-admitted liar, as a witness in future cases. The prosecutor apparently felt compelled to make known the government's disavowal of Kalady in order to dispel the prejudice from McDonnell's question. Moreover, Kalady was called by Mirro only for the purpose of attacking Ackerman's credibility. As petitioners point out (Pet. 20–21), Ackerman's credibility had already been brought under heavy attack by a showing of his "unsavory" past and the charges against him pending at the time of trial (Pet. App. 8).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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